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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 969

John A. Thomson,

Petitioner,

—v.—

State of New Hampshire,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

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IN THE

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No. .....

John A. Thomson,

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—v.—

State of New Hampshire,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

Petitioner prays that a writ of certiorari issue to review the judgment of the New Hampshire Supreme Court entered October 31, 1968.

Opinions Below

The opinion of the New Hampshire Supreme Court is reported in 247 A. 2d 179 (1968) and set out in the Appendix, *infra*, pp. 1a-6a. Petitioner being convicted upon trial by jury in the Rockingham County Superior Court no opinion for that Court exists.

Jurisdiction

The judgment of the New Hampshire Supreme Court was entered on October 31, 1968. The Jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(3).

Constitutional and Statutory Provisions Involved

The constitutional provisions involved in this case are the Sixth and Fourteenth Amendments to the United States Constitution and New Hampshire RSA 500:1-23 set out in the Appendix, *infra*, pp. 7a-11a.

Questions Presented

1. Whether the failure of New Hampshire to follow its own law violates Petitioner's right to due process and equal protection under the Fourteenth Amendment to the United States Constitution?

2. Whether New Hampshire RSA 500:1 provides an arbitrary and unreasonable standard for the selection of jurors in violation of the Sixth and Fourteenth Amendments to the United States Constitution?

3. Whether systematic exclusion of individuals under the age of forty from Rockingham County grand and petit juries denies Petitioner equal protection of the law under the Fourteenth Amendment to the United States Constitution?

Statement of the Case

Petitioner was indicted by the Rockingham grand jury on a charge of being an accessory before the fact of breaking, entering and larceny in the nighttime. Prior to trial, the Petitioner filed a motion to quash the indictment on the basis of irregularities in the selection of the members of the grand jury and a motion to quash the panel of petit jurors from which the jury before which he was to be tried was to be chosen. Both motions were denied and Petitioner was convicted in the Rockingham County Superior Court of the offense charged.

Rockingham County grand and petit jurors are drawn pursuant to State law from a list of eligible jurors prepared by the selectmen of each town throughout the County and from the selectmen from each of the six wards in Portsmouth, the County's only city. The selectmen prepare a list of such men and women from their town or ward whom the selectmen "judge best qualified to serve as jurors." RSA 500:1. The list must contain a fixed minimum number of eligible individuals depending on the population of the town or ward. RSA 500:2. The names are then placed on separate sheets of paper and placed in a box to be kept by the town or city clerk. RSA 500:4. Jurors are then drawn from the box by the town clerk in the presence of the selectmen or by the clerk of each ward in the City of Portsmouth in the presence of the city clerk and ward selectmen. RSA 500:11. State law prohibits selectmen from soliciting individuals for jury duty or placing names of individuals at their request on the jury list. RSA 500:22. No person shall be returned as a juror within a two year period. RSA 500:15.

The procedure followed in the selection of petit jurors from which the grand jury that indicted the Petitioner was chosen deviated from that made mandatory under State law in the following respects:

1. Selectmen from various wards in Portsmouth were not required to submit complete jury lists in terms of the number of persons required by State law to be on such lists.

2. Jurors were selected from incomplete lists in terms of the number of people required to be on such lists.

3. Selectmen were not required to be present when jurors were chosen from the jury list by ward clerks.

4. Selectmen solicited the names of individuals for jury duty who expressed a willingness to serve year after year.

5. Individuals were placed on jury lists by selectmen as a result of their own request.

The record also indicates that a high percentage of elderly individuals were consistently chosen as jurors as a result of a systematic exclusion and discrimination of jurors under forty years of age.

REASONS FOR GRANTING WRIT

I.

The failure of the State to follow its own law denies Petitioner his right to due process and equal protection of law under the Fourteenth Amendment to the United States Constitution.

Petitioner maintains that the State's failure to follow its own State law in the selection of the jury which indicted him violates the Equal Protection clause of the Fourteenth Amendment to the Federal Constitution. *Beck v. Washington,* 369 U.S. 541 (1961) (Black, J. dissenting). The record and opinion below indicate the precedure used to select jurors in Rockingham County deviated from the State law requirements. In other counties within the State it must be presumed in the absence of proof to the contrary that juries are selected according to State law requirements. *Tarrance v. Florida,* 188 U.S. 519 (1903). Thus, while an individual accused of a crime in another county of the State receives a jury drawn in accord with the provisions of the State law, an individual accused of the same crime in Rockingham County is given less protection in achieving an impartial jury. Such distinction in application

of State law based solely on the county of indictment is both unreasoned and invideous. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341 (1949).

The Petitioner contends that this Court is not bound by the State Court finding that the State's failure to follow its own law was not "substantial" and did not result in prejudice to Petitioner. *Stein v. New York*, 346 U.S. 156 (1953). Rather, this Court should find that the deprivation to Petitioner of the safeguards intended by the New Hampshire legislature worked a substantial prejudice to Petitioner. In other contexts when basic constitutional rights were at stake, this Court has said the failure to prove prejudice cannot be determinative as "the degree of prejudice can never be known." *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *White v. Maryland*, 373 U.S. 59 (1963).

Petitioner further contends the State's conscious refusal to follow its own State law denies Petitioner's right to due process under the Fourteenth Amendment because it departs from one of the "fundamental principles of our society." *Bartkus v. Illinois*, 359 U.S. 121, 128 (1959). If Due Process protection is to have any significance it must at the very least require that a state adhere to its own established law.

II.

RSA 500:1 allows an arbitrary and unreasonable standard for the selection of jurors in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

Because RSA 500:1 limits jurors to those individuals deemed "best qualified to serve as jurors" in the opinion of

the selectmen, its administration deprives the Petitioner of his right under the Sixth and Fourteenth Amendments to an impartial jury "truly representative of the community." *Smith v. Texas,* 311 U.S. 128, 130 (1940); *Ballard v. United States* 329 U.S. 187 (1946); *Thiel v. Southern Pacific Co.,* 328 U.S. 217 (1946). In *United States v. American Oil Co.,* 249 F. Supp. 130, 133 (D.C.N.J. 1965) the Court said:

> Officials charged with the responsibility of selecting names of persons for service on grand and petit juries may exercise some discretion to the end that competent persons be selected, but procedures must be employed in such selection whereby juries will be truly representative of a cross-section of the community.

The administration of RSA 500:1 does not result in the selection of a jury representing a cross-section of the community. Unlike *Swain v. Alabama,* 380 U.S. 202 (1965), there are no objective sources used by selectmen in Rockingham County to assure a cross-section of individuals on the jury lists. There are no "standards of fundamental fairness" to assure an impartial jury. *Fay v. New York,* 332 U.S. 261, 294 (1947).

III.

The systematic exclusion of individual under the age of forty from Rockingham County grand and petit juries denies Petitioner equal protection of the law under the Fourteenth Amendment to the United States Constitution.

The unlimited discretion allowed the selectmen under RSA 500:1 in selecting individuals for jury lists has resulted in the systematic exclusion of individuals under 40 years of age and the development of "professional" class of jurors culled from the ranks of the elderly expressing a willingness to serve. Such systematic and intentional exclusion of individuals under 40

years of age who are otherwise qualified violates the equal protection clause of the Fourteenth Amendment. *Smith v. Texas, supra; Thiel v. Southern Pacific Co., supra Glasser v. United States,* 315 U.S. 60 (1942).

CONCLUSION

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,

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January 9, 1969

APPENDIX

In The

Supreme Court of New Hampshire

No. 5742

STATE

v.

John A. Thomson

Filed: October 31, 1968

LAMPRON, J. Appeal from a conviction of being an accessory before the fact of breaking, entering and larceny in the nighttime. Prior to trial the defendant filed a motion to quash the indictment against him because of irregularities in the selection of the members of the grand jury. He also filed a motion "to quash the panel" of petit jurors, from which the jury before which he was to be tried was to be chosen, because of irregularities in its selection. After a hearing before *Bownes, J.*, these motions were denied and defendant's exceptions thereto reserved and transferred. The issues of law raised by the denial of these motions are the only questions before us on this appeal.

The grand jury dates back to at least 1166 (2 Pollock & Maitland, History of English Law, *p.* 629 (1898)) and the petit jury had its beginning in the Great Charter of 1215. They represent "a deep commitment to the use of laymen in the

administration of justice." *Kalven & Zeisel,* The American Jury, *p.* 3 (1966). "It is the jury that gives English and American trials their distinctive characteristics." Arthur T. Vanderbilt, Judges and Jurors, 36 B.U.L.Rev. 1, 51. "The jury holds in its collective hands the life, liberty and the welfare of individual defendants in criminal cases and the interest of litigants in civil cases." Report of Committee on Operation of the Jury System of the Judicial Conference of the United States (1960) 26 F.R.D. 409, 419. They are "given the power of decision, and are permitted to deliberate in secret and to announce their verdict without giving reasons for it." A.B.A., Standards Relating To Trial by Jury, *p.* 1 (Tent. Draft 1968). Thus, how the selection of panels of prospective jurors is made goes to the heart of getting effective juries. 36 B.U.L. Rev. 1, 68.

The establishment of the means and methods for the selection of jurors is a function of the Legislature. *State v. Moore,* 69 N.H. 102, 114; *Labat v. Bennet t*365 F. 2d 698, 720 (5th Cir. 1966); *Brown v. Allen,* 344 U.S. 443, 473; *Fay v. New York,* 322 U.S. 261, 294. However the modes of selection must be designed to insure that the panels of grand jurors and of petit jurors are drawn "impartially from a cross-section of the community." *Witherspoon v. Illinois,* 391 U.S. 510.

The focus of the law is on the list from which the jury is drawn and not on the composition of the particular jury or grand jury. *Pinkey v. United States,* 380 F. 2d 882, 887 (5th Cir. 1967). It is not required that there be a proportionate representation of all classes and religions in a particular panel as it "is doubtful if any system could be devised to accomplish this purpose." *United States v. Hoffa,* 349 F. 2d 20, 31 (6th Cir. 1965); *Thiel v. Southern P. Co.,* 328 U.S. 217, 220. In other words it is the source from which a particular jury is selected which must be representative. A.B.A., Standards Relating to Trial by Jury (Tentative Draft 1968), *p.* 51; Report of the Committee on the Operation of the Jury System

of the Judicial Conference of the United States (1967) 42 F.R.D. 353, 369.

In December 1966, when the selectmen submitted the jury lists from which were drawn the grand jury which found the indictment against the defendant, and the panel of petit jurors from which the jury before which he was tried was selected, RSA 500:1 provided "that the name of a woman shall not be placed on said jury list unless she shall first have appeared before said selectmen and registered for jury service." This provision was repealed effective September 1, 1967. Laws 1967, 100:1. Defendant argues in his brief "that the panel was unconstitutionally drawn because women were not provided the same opportunity to serve as men."

The right of a State to permit women to serve as jurors only if they volunteered was upheld in *Hoyt v. Florida,* 368 U.S. 57, 61. The Court specifically noted in its decision that New Hampshire and Louisiana had similar statutes and stated: "We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities." *pp.* 62, 63. See Annot. 9 A.L.R. 2d 661, 671. Consequently we hold that this factor does not constitute a valid ground for challenge of the panel of jurors which found the indictment against the defendant or from which the petit jury before whom he was tried was drawn.

RSA ch. 500 governs the selection of the panels of jurors from which grand juries and petit juries are chosen. It provides that the selectmen of each town and ward annually in December shall "make a list of such men and women as they judge best qualified to serve as jurors." RSA 44:8; RSA 500:1; RSA 600:1. These lists are to contain a maximum and minimum number of names depending on the population of the town or ward RSA 500:2. These names written on separate pieces of paper are placed in a box kept under lock

(Id., s. 4). When the number of names therein is reduced below the smallest required number the selectmen shall place sufficient names in the box to meet that requirement *(s. 5).* The selectmen are to be notified by the town or city clerk of the time and place for the drawing of the number of jurors directed by the court to be summoned and the selectmen shall attend at the time and place appointed *(ss. 10-12).* The jurors there chosen who actually attend the court to which they are returned shall not be again placed in the box within two years. Among the other provisions of RSA ch. 500 are criminal penalties for the misfeasance of selectmen and of town clerks in the process of the drawing of jurors including, among others, the placing on the list "the name of a person at his own request or on the request of any other person." *ss. 22,23.*

It is evident from what has been said previously in this opinion that the officials charged with this task bear a heavy responsibility in maintaining and assuring the integrity and substance of the jury system. Const., Pt. I Articles 15, 20, 21; *State v. Moore* 69 N.H. 102, 115; *Fay v. New York,* 322 U.S. 261, 294. They alone have the duty and the opportunity, under RSA ch. 500, to ensure that the panel of jurors will consist of a selection made at random, from representative sources of persons reflecting a normal cross-section of the population involved who are capable of performing completely the responsibilities of a juror. *Brown v. Allen,* 344 U.S. 443, 473; *Witherspoon v. Illinois,* 391 U.S. 510; *People v. Henry,* 284 N.Y.S. 2d 726, 730.

This does not mean that jurors on a given panel must come from all towns in a county or from towns scattered over all the county for under court direction each town will be given the opportunity to furnish its proper proportion of jurors. *State v. Moore,* 69 N.H. 102, 115; *State v. Jackson,* 77 N.H. 287, 288, 289; Const. Pt. I, Art. 17th. The paramount factor is that the jury panel must not be an arbitrarily selected group, either by design or by the failure of the officials charged with the selection to perform their statutory duties. *Thiel v. Southern*

P. Co., 328 U.S. 217, 220; *Rabinowitz v. United States*, 336 F. 2d 34, 59, 60 (5th Cir. 1966).

Defendant contends that the following failures to comply with the provisions of RSA ch. 500 constituted a fatal defect in the panel of grand and petit jurors. The city clerk of Portsmouth testified that there was a request for an additional juror from Ward 6 in that city. "I had to get in touch with the ward clerk, and it was urgent." "There was just one name left in the jury box, and that was the name he selected." RSA 500:19, 24 and RSA 600:2 provide for certain summary actions which can be taken in cases of emergency. It is evident that in some such instances all of the requirements provided for the selection of jurors under ordinary circumstances cannot be followed. *United States v. State of New Jersey*, 289 F. 2d 846 (3rd Cir. 1961).

The city clerk of Portsmouth also testified as follows: "Q. So that there are instances on this present jury where names have been selected from an inadequate list presented by the ward selectmen? . . . A. Well, yes, that's true." There was no testimony as to which or in how many of Portsmouth's six wards this was true, or how much below the required minimum number of names were in a particular box, with the exception of Ward 6. RSA 500:2, 4. This witness also testified that he believed it was true that in some instances the selectmen checked with people to ask them if they wished to serve as jurors and "have continued to select these same people who indicate a willingness to serve in some cases." See RSA 500:22. He also testified that all the selectmen were not present when the names were drawn. RSA 500:11, 13.

Questionnaires which jurors are asked to fill out after having been chosen gave some indication that several elderly persons were on the jury panel and also one juror who had served on another jury panel one year prior to the trial of defendant's case. RSA 500:15.

As we have said previously, RSA ch. 500 is designed to assure the integrity of the jury system, and to accomplish this

purpose we hold that there must be a substantial compliance with the essential provisions of this chapter. 50 C.J.S., Juries, *s.* 163 (b), *pp.* 889, 890. However, we fail to see and the defendant failed to prove how the irregularities in this case constituted such material departures from the statutory provisions as to prejudice his rights. *State v. Goyet,* 119 Vt. 167, 173; 5 Wharton's, Criminal Law and Procedure, s. 1961, *p.* 90 (1957). The irregularities did not constitute a systematic and intentional exclusion of any group of individuals nor did they produce a panel so unrepresentative of a cross-section of the county as to violate defendant's right under our Constitution (Const., Pt. I, Articles, 15, 17, 21) or under the 14th Amendment of the Federal Constitution. *Brown v. Allen,* 344 U.S. 443, 473, 474; *Witherspoon v. Illinois,* 391 U.S. 510.

Exceptions overruled.

All concurred.

NEW HAMPSHIRE REVISED

STATUTES ANNOTATED

CHAPTER 500

JURORS

500:1 Town Lists. The selectmen of each town shall annually in December, make a list of such men and women as they judge best qualified to serve as jurors; and the list shall be kept by them and delivered to their successors in office. Provided, however, that any women who has care of one, or more children under the age of twelve years shall, if she so desires be exempt from jury duty.

500:2 Number of Names. The lists shall not contain the names of more than fifteen persons in towns containing less than six hundred inhabitants; twenty-five, in all other towns containing less than twelve hundred; thirty-five, in all other towns containing less than two thousand; forty, in all other towns containing less than five thousand; and forth-five in all towns containing more than five thousand inhabitants; and they shall not contain less than one half the number fixed as the highest number of names to be put on the list.

500:3 Exemptions. The governor, secretary and treasurer of the state, judges and clerks of the courts, registers of deeds and of probate, sheriffs and their deputies, attorneys-at-law, ordained ministers, practicing physicians and surgeons, post-masters and their assistants, fire engineers, firewards and firemen, except firemen in towns of less than twenty-five hundred inhabitants, and any person interested in the illegal sale of intoxicating liquors or renting buildings for that purpose, are exempt from serving as jurors, and their names shall not be placed on the list.

500:4 Procedure in Making List. The names on the list in each town shall be written upon separate and similar pieces of paper, which shall be so rolled up that the name cannot be seen, and shall be placed in a box provided for that purpose by the selectmen, to be kept by the town clerk under lock.

500:5 Revision of List. When the number of names in the jury box is reduced below the smallest number which the list is required to contain, the selectmen, before the day appointed for drawing, shall revise the list, and place in the box the names thereon, as required to be done in December.

500:6 Attendance. Grand and petit jurors shall attend the terms of the superior court, and they may be summoned at the discretion of the court during its session.

500:7 Court Orders. The court, acting as a body, shall direct the number of jurors to be summoned, and from what towns, so that each may furnish its proportion of jurors in each year.

500:8 Venires. The clerk of the superior court shall issue writs of venire facias, directed to the clerks of such towns as the court may order, forty days before the sitting of the court, requiring them to cause to be selected and returned so many jurors as are therein mentioned.

500:9 Delivery of Venires. He shall cause the venires to be delivered to such town clerks twenty-five days, or to the sheriff forty days, before the sitting of the court; and the sheriff shall cause the venires received by him to be delivered to the town clerks twenty-five days before such sitting.

500:10 Notice of Drawing. Upon the receipt of the venire, the town clerk shall notify the selectmen of the time and place by him appointed for drawing jurors, and shall post a notice thereof in some public place in the town, seven days

at least before the time appointed.

500:11 **Drawing.** The selectmen shall attend at the time and place appointed, and the town clerk, in their presence and in the presence of such other persons as choose to attend, shall draw from the box, so holden that the papers therein cannot be seen, the names of so many persons as are required by the venire. In the absence of the clerk one of the selectmen shall draw the names.

500:12 **Notice, Place, in Cities.** The notice of the time and place appointed for drawing jurors in any city shall also be posted in the city hall, or building in which the office of the city clerk is kept; and the place of drawing for every ward shall be the office of the city clerk.

500:13 **Duties of City Clerks.** The city clerk shall attend every drawing of jurors in the city, shall ascertain that all the names on the jury list for any ward are in the box, and shall see that the drawing of jurors is publicly and fairly made.

500:14 **Further Drawing.** If any person whose name is so drawn is dead, insane or disabled by sickness, or has removed from town, the town clerk shall certify the fact on the venire and draw another name.

500:15 **Return; Future Ineligibility.** The persons whose names are drawn shall be returned as jurors, and the names of those who actually attend the court to which they are so returned shall not be again placed in the box within two years.

500:16 **Record.** The town clerk shall record the notice posted by him, the names of the selectmen present and the persons drawn as jurors.

500:17 **Notice to Jurors.** The town clerk, a constable or one of the selectmen shall give to each juror, or shall leave at his abode, four days at least before the sitting of the court, a

notice in writing of his selection as a juror, of the court he is to attend and of the day and hour he is to appear.

500:18 Return of Venire to Court. The town clerk shall certify upon the venire the names of the persons so drawn, and that they have been notified as aforesaid, and shall cause such venire to be returned to the clerk of the court before the hour at which the juror is required to attend.

500:19 Forthwith Venires. At any time after twenty-five days before the beginning of any term, the clerk of the superior court, if he deems if necessary for any reason to obtain a full and adequate array, may issue venires with notice forthwith of the time and place of drawing and to the jurors drawn. Jurors so drawn shall attend the court as directed in the venire.

500:20 Penalty for Neglect of Officials. If any clerk, sheriff or town clerk neglects to perform any of the duties enjoined by this chapter he shall be fined by the court twenty dollars.

500:21 Penalty for Neglect of Juror. If any person selected as a juror and duly notified to attend neglects, without sufficient cause, to attend aggreably to such notice, he shall be fined by the court not more than twenty dollars.

500:22 Misfeasance, of Selectmen. If any selectman willfully neglects to perform any duty required by this chapter, or puts upon the list a greater number of names than is allowed by law, or the name of a person at his own request, or on the request of any other person, or unlawfully withdraws from the box the name of a person upon the list, or is guilty of any fraud or collusion with respect to the drawing of jurors, he shall be fined fifty dollars.

500:23 Misfeasance, of Town Clerk. If a town clerk

draws from the box greater number of names than are mentioned in the venire, except in cases provided, or unlawfully puts a name, or suffers it to be put, into the box after the box is delivered to him, or is guilty of any fraud or collusion in respect to the drawing of jurors, he shall be fined fifty dollars.